Supreme Court, U.S.
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No. 01-930

In The

# Supreme Court of the United States

**WARREN L. DINGES, Captain U.S. Air Force,**

***Petitioner,***

**v.**

**UNITED STATES OF AMERICA,**

***Respondent.***

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES**

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## Petition for Writ of Certiorari

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## QUESTION PRESENTED

Is a military special court-martial convening authority, who is also a director and fiduciary of the civilian organization allegedly victimized by the accused's crime, disqualified from acting in the case because he is a person with "an interest other than an official interest" in the accused's prosecution where, alerted to the alleged misconduct of the accused by a member of the organization in which he is a director and fiduciary, the special court-martial convening authority exercises the substantial authority and discretion invested in him to order a pretrial investigation of the accused and recommend the accused be tried by general court-martial?

## PARTIES TO THE PROCEEDING

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IN THE
Supreme Court of the United States

No.

WARREN L. DINGES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES*

## PETITION FOR WRIT OF CERTIORARI

The petitioner, Warren L. Dinges, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Armed Forces rendered in this proceeding on August 22, 2001.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, *United States v. Dinges*, 55 M.J. 308 (C.A.A.F. 2001), is reprinted as Appendix A.

The opinion of the United States Air Force Court of Criminal Appeals, *United States v. Dinges*, No. 32122 (A.F. Ct. Crim. App. January 8, 1997) is reprinted as Appendix B.

## JURISDICTION

The United States Court of Appeals for the Armed Forces affirmed the decision of the United States Air Force Court of Criminal Appeals on August 22, 2001. This Court

possesses discretionary jurisdiction of this case pursuant to 28 U.S.C. § 1259(3), which entitles petitioner to seek review of the United States Court of Appeals for the Armed Forces' decision below.

## Relevant Constitutional, Statutory, and Regulatory Provisions

*Statutes*

**10 U.S.C. § 801. Definitions**

In this chapter:

* * *

(9) The term "accuser" means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

* * * *

**10 U.S.C. § 822. Who may convene general courts-martial**

(a) General courts-martial may be convened by–

* * *

(7) the commanding officer of an air command, an air force, an air division, or a separate wing of the Air Force or Marine Corps;

(8) any other commanding officer designated by the Secretary concerned; or

(9) any other commanding officer in any of the armed forces when empowered by the President.

(b) If any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him.

**10 U.S.C. § 925. Sodomy**

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

*Rules for Courts-Martial*

**Rule for Court-Martial 306. Initial disposition**

(a) Who may dispose of offenses. Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense. A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.

(b) Policy. Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition listed in subsection (c) of this rule.

(c) How offenses may be disposed of. Within the limits of the commander's authority, a commander may take the actions set forth in this subsection to initially dispose of a charge or suspected offense.

(1) No action. A commander may decide to take no action on an offense. If charges have been preferred, they may be dismissed.

(2) Administrative action. A commander may take or initiate administrative action, in addition to or instead of other action taken under this rule, subject to regulations of the Secretary concerned. Administrative actions include corrective measures such as counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges, or any combination of the above.

(3) Nonjudicial punishment. A commander may consider the matter pursuant to Article 15, nonjudicial punishment. See Part V.

(4) Disposition of charges. Charges may be disposed of in accordance with R.C.M. 401.

(5) Forwarding for disposition. A commander may forward a matter concerning an offense, or charges, to a superior or subordinate authority for disposition.

(d) National security matters. If a commander not authorized to convene general courts-martial finds that an offense warrants trial by court-martial, but believes that trial would be detrimental to the prosecution of a war or harmful to national security, the matter shall be forwarded to the general court-martial convening authority for action under R.C.M. 407(b).

**Rule for Courts-Martial 401. Forwarding and disposition of charges in general**

(a) Who may dispose of charges. Only persons authorized to convene courts-martial or to administer nonjudicial punishment under Article is may dispose of charges. A superior competent authority may withheld the authority of a subordinate to dispose of charges in individual cases, types of cases, or generally.

(b) Prompt determination. When a commander with authority to dispose of charges receives charges, that commander shall promptly determine what disposition will be made in the interest of justice and discipline.

(c) How charges may be disposed of. Unless the authority to do so has been limited or withheld by superior competent authority, a commander may dispose of charges by dismissing any or all of them, forwarding any or all of them to another commander for disposition, or referring any or all of them to a court-martial which the commander is empowered to convene. Charges should be disposed of in accordance with the policy in R.C.M. 306(b).

(1) Dismissal. When a commander dismisses charges further disposition under R.C.M. 306(c) of the offenses is not barred.

(2) Forwarding charges.

(A) Forwarding to a superior commander. When charges are forwarded to a superior commander for disposition, the forwarding commander shall make a personal recommendation as to disposition. If the forwarding commander is disqualified from acting as convening authority in the case, the basis for the disqualification shall be noted.

(B) Other cases. When charges are forwarded to a commander who is not a superior of the forwarded commander, no recommendation as to disposition may be made.

(3) Referral of charges. *See* R.C.M. 403, 404, 407, 601.

(d) National security matters. If a commander who is not a general court-martial convening authority finds that the charges warrant trial by court-martial but believes that trial would probably be detrimental to the prosecution of a war or harmful to national security, the charges shall be forwarded to the officer exercising general court-martial convening authority.

**Rule for Courts-Martial 504. Convening courts-martial**

(a) In general. A court-martial is created by a convening order of the convening authority.

(b) Who may convene courts-martial.

(1) General courts-martial. Unless otherwise limited by superior competent authority, general courts-martial may be convened by persons occupying positions designated in Article 22(a) and by any commander

designated by the Secretary concerned or empowered by the President.

* * *

(c) Disqualification.

(1) Accuser. An accuser may not convene a general or special court-martial for the trial of the person accused.

(2) Other. A convening authority junior in rank to an accuser may not convene a general or special court-martial for the trial of the accused unless that convening authority is superior in command to the accuser. A convening authority junior in command to an accuser may not convene a general or special court-martial for the trial of the accused.

(3) Action when disqualified. When a commander who would otherwise convene a general or special court-martial is disqualified in a case, the charges shall be forwarded to a superior competent authority for disposition. That authority may personally dispose of the charges or forward the charges to another convening authority who is superior in rank to the accuser, or, if in the same chain of command, who is superior in command to the accuser.

* * * *

## STATEMENT OF THE CASE

Pursuant to his plea, petitioner was convicted by a general court-martial, military judge alone, of one count of sodomy in violation of 10 U.S.C. § 925. Petitioner was sentenced to a dismissal, forfeiture of all pay and allowances,

and confinement for five (5) months. On 23 April 1996, the convening authority approved the findings and sentence as adjudged.

Subsequent to trial, petitioner learned that the special court-martial convening authority, an active duty Air Force Colonel who ordered petitioner's case investigated pursuant to 10 U.S.C. § 832, also was an officer and director in the regional Boy Scouts of America corporation that claimed to have been victimized by appellant's conduct with a 16 year-old Boy Scout while petitioner was serving as a Boy Scout leader. Further, review of the court-martial forwarding documents established that the special court-martial convening authority failed to identify his affiliation as a fiduciary in the "victim" organization when he recommended that petitioner be tried by general court-martial rather than administratively discharged pursuant to the "Don't Ask, Don't Tell" policy of the Department of Defense.

In his direct appeal as of right to the Air Force Court of Criminal Appeals, appellant asserted that the special court-martial convening authority was statutorily disqualified from making a recommendation in petitioner's case pursuant to 10 U.S.C. § 822(b) and that the special court-martial convening authority committed prejudicial error by failing to disclose his fiduciary relationship in the "victim" organization, as required by Rule for Court-Martial 401(c)(2)(A), promulgated by the President. In an unpublished opinion, the United States Air Force Court of Criminal Appeals affirmed the findings and sentence below. *United States v. Dinges*, No. 32122 (A.F. Ct. Crim. App. January 8, 1997) (App. B).

On discretionary appeal to the United States Court of Appeals for the Armed Forces pursuant to 10 U.S.C. § 867(a)(3), the Court of Appeals for the Armed Forces ordered a post-trial fact-finding hearing to ascertain the facts concerning the special court-martial convening authority's affiliation with the Boy Scouts of America and to determine whether the special court-martial convening authority was

disqualified because of "an other than official interest in appellant's prosecution." *United States v. Dinges*, 49 M.J. 232, 235 (1998).

During the course of the fact-finding hearing ordered by the United States Court of Appeals for the Armed Forces, the evidence disclosed that Air Force officials who procured a grant of testimonial immunity for petitioner's civilian accomplice in the alleged acts of sodomy had made knowingly false and fraudulent statements of fact (relating, significantly, to the age of petitioner's homosexual partner) to the Department of Justice in order to obtain the grant of immunity and order to testify, which ultimately led petitioner to plead guilty.[1]

On further consideration of the case on appeal subsequent to the fact-finding hearing ordered by the Court of Appeals, the United States Court of Appeals for the Armed Forces affirmed petitioner's conviction in a 3-2 decision on the grounds that the special court-martial convening authority, who also was a fiduciary in the Boy Scouts corporate organization, did not have an other-than-official interest (*i.e.*, was not an "accuser") in appellant's prosecution. App. A, p. 4. The Court further held that the issue of the Government's use of fraudulent statements to procure a grant of immunity was moot because the Government never called the accomplice as a witness at trial and because petitioner "invited error" by calling his accomplice as a witness during the sentencing proceedings. App. A, p. 5.

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[1]Petitioner entered his plea of guilty to sodomy only after the Government and Military Judge threatened his accomplice with prosecution for failing to testify in accordance with the provisions of the grant of immunity and order to testify issued by the Department of Justice.

## REASON FOR GRANTING THE WRIT

Whether a military court-martial convening authority, who also is a fiduciary in the civilian corporation allegedly victimized by petitioner's conduct and possesses substantial discretion and authority to subject military members to trial by court-martial as a result of his position as a court-martial convening authority, is an "accuser" under the Uniform Code of Military Justice, and therefore is disqualified from exercising that discretion because of an interest "other than an official interest" in prosecution of an accused, is a compelling and important question that should be resolved by this Court.

The special court-martial convening authority is a pivotal role in the military justice system. The special court-martial convening authority possesses initial plenary discretion to decide the disposition of allegations of misconduct against a military member. The special court-martial convening authority is invested with the broad and largely unfettered discretion to take no action at all on the allegations of misconduct; dismiss charges once they are preferred; take or initiate administrative action such as administrative discharge under the Department of Defense "Don't Ask, Don't Tell" policy; impose non-judicial punishment pursuant to 10 U.S.C. § 815; refer charges to special court-martial with substantial limitations on maximum punishment faced by the accused; or, order a pretrial investigation pursuant to 10 U.S.C. § 832. *See* Rule for Court-Martial ("R.C.M."), 306, 404, Manual for Courts-Martial, United States (1995 ed.). The special court-martial convening authority's discretion and decision on initial disposition is a critical juncture for an accused in the military justice system. *United States v. Nix*, 40 M.J. 6, 7 (C.M.A. 1994).

Recognizing the substantial authority military court-martial convening authorities possess and the requirement that their discretion be exercised with wise discretion, objectivity and fairness, Congress disqualified military commanders, serving as special court-martial convening authorities, and who met the definition of an "accuser" under the Uniform Code of Military Justice, from convening courts-martials. 10 U.S.C. § 822(b). Congress defined an accuser, *inter alia*, as "any person who has an interest other than an official interest in the prosecution of the accused." 10 U.S.C. § 801(9). Where a court-martial convening authority also is an "accuser," he or she must forward the charges for disposition by superior convening authority, R.C.M. 504(c)(3), and inform the superior authority, as well as the accused, by way of the forwarding memorandum, of the reason for the disqualification. R.C.M. 401(c)(2)(A).

In *United States v. Gordon*, 1 U.S.C.M.A. 255, 262, 2 C.M.R. 161, 168 (1952), the general court-martial convening authority who ordered the court-martial of was the victim of the attempted burglary of which the accused was tried. The United States Court of Military Appeals, the predecessor to the United States Court of Appeals for the Armed Forces, disqualified the convening authority, concluding that as the victim of the attempted burglary, the convening authority possessed other than an official interest in a case because he was the intended victim of the crime. Accordingly, because of this other than an official interest, the Court concluded the convening authority was a statutory "accuser," and prohibited from making decisions regarding that case. *Id.* The Court held that the appropriate test to be applied was "whether, under the particular facts and circumstances ... a reasonable person would impute to him a personal feeling or interest in the outcome of the litigation." *United States v. Gordon*, 1 U.S.C.M.A. 255, 260, 2 C.M.R. 161, 166 (1952) (emphasis added).

Similarly, in *United States v. Nix*, *supra*, the Court of Appeals for the Armed Forces examined the accuser disqualification in terms of its effect on the forwarding recommendation of the special court-martial convening authority, a circumstance similar to that faced by petitioner in the instant case. 40 M..J. at 7-8. In *Nix*, the special court-martial convening authority who recommended trial by court-martial, rather than any lesser disposition within his discretion and authority, was romantically involved (and later married) one of the principle witnesses against the accused in a prosecution for consensual sodomy, use of marijuana and maltreating a subordinate. *Id.* The Court of Appeals set aside the findings and sentence, holding that the special court-martial convening authority's recommendation in the accused's case could not be said to have been "immaterial" to the decision to try the accused by general court-martial. *Id.* at 8.

The instant case involved an alleged homosexual relationship and acts between the petitioner, a Boy Scout assistant troop leader, and a 16 year-old member of the Boy Scouts. Homosexuality is a particularly troubling issue for both the military, *see* 10 U.S.C. § 654 (policy on homosexuality in the armed forces), and for the Boy Scouts. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000) (sustaining Boy Scouts' First Amendment right to eject an admitted homosexual assistant scoutmaster).

As a result of the Boy Scouts' policy, a senior Boy Scout executive who learned of petitioner's relationship with the Boy Scout, Mr. Paul Moore, aggressively sought petitioner's prosecution by state and local law enforcement officials. Rebuffed by local and state prosecutors and law enforcement agencies who were "not interested in

prosecuting" petitioner,[2] Mr. Moore l raised the matter of petitioner's prosecution with the Chairman of the local Boy Scout District and member of the regional Board of Directors of the Boy Scout non-profit corporation at a regularly scheduled Boy Scout directors meeting. The director approached by Mr. Moore also happened to be an active duty Air Force Colonel and the special court-martial convening authority for the military base nearest to where petitioner was assigned as an Air Force graduate education student. As a result of the information obtained from Mr. Moore at the Boy Scout director's meeting, the special court-martial convening authority ordered a criminal investigation to be conducted by the Air Force Office of Special Investigations, ordered a pretrial hearing in accordance with Article 32, UCMJ, 10 U.S.C. § 832, and ultimately recommended petitioner be tried by general court-martial rather than simply administratively discharged pursuant to the "Don't Ask, Don't Tell" policy of the Department of Defense, as was authorized by Department of Defense and Air Force regulations.

Under the laws of Oklahoma, as a director of the Boy Scout Corporation, the special court-martial convening authority in petitioner's case was a fiduciary who owed a duty of undivided loyalty to the Boy Scout organization. Okla. Stat. Ann. Tit. 18 § 1006B.7.a (director's liability to corporation may be limited except for breach of fiduciary duty of loyalty to the corporation or its shareholders); *Resolution Trust Corp. v. Greer*, 911 P.2d 257, 261 n.9 (Okla. 1995) (Oklahoma recognizes a director's common-law fiduciary status and duty to the corporation); *Wilson v. Harlow*, 860 P. 2d 793, 798 (Okla. 1993) ("It is well-settled that directors of a corporation owe a fiduciary duty to the

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[2]The age of consent in Oklahoma is 16 years old, *Kimbro v. State*, 857 P.2d 798 (Okla. 1990); 21 Okla. Stat. Ann. § 886 (West Supp. 1997), hence the youth was old enough under state law to make his own decisions regarding his sexual orientation.

corporation and its stockholders under the common law."). It was irrelevant to the special court-martial convening authority's fiduciary status that the corporation was a non-profit, *see* 18 Okla. Stat. Corporations § 1002A (provisions of Oklahoma General Corporations Act are applicable to every corporation whether profit or not for profit), nor did it matter that he was not particularly active or involved in the day-to-day operations of the corporation. *Preston-Thomas Constr., Inc. v. Central Leasing Corp.*, 518 P.2d 1125, 1127 (Okla. App. 1973) (director is charged with knowledge of the acts taken on behalf of the corporation regardless of whether he was present at a particular meeting). Under the governing law of Oklahoma, the special court-martial convening authority, as a director, owed his undivided loyalty to the corporation.

In concluding that a military officer, who was also a fiduciary in the civilian organization allegedly victimized by petitioner's conduct, did not have an "other than official interest" in petitioner's prosecution, the Court of Appeals below substantially departed from its own well-established precedent, compelled by federal statute and rules promulgated by the President that hold that a convening authority who is or may be a victim of the accused's misconduct is an "accuser" and, therefore, is disqualified from making decisions in the case. *See e.g.*, *Brookins v. Cullins*, 23 U.S.C.M.A. 216, 49 C.M.R. 5 (1974) (commanding officer of a Navy ship on which accused and other sailors rioted disqualified to be the convening authority for their court-martial on charges stemming from the riot); *Gordon*, 1 U.S.C.M.A. at 260, 2 C.M.R. at 166 (convening authority as victim of attempted burglary); *see also Nix*, 40 M.J. at 8 (special court-martial convening authority romantically involved with witness against the accused disqualified). In view of the trial court's decision to permit the Boy Scout executive who instigated petitioner's prosecution to provide "victim impact" testimony on behalf of the Boy Scouts and the special court-martial convening

authority's role in that very same organization as a director and fiduciary, it is clear that the special court-martial convening authority was a person with *"an* interest other than an official interest in appellant's prosecution," 10 U.S.C. § 801(9) (emphasis supplied), who was disqualified from taking official action in petitioner's case and that the Court of Appeals misapplied clearly governing statute prohibiting the special court-martial convening authority from taking discretionary actions in petitioner's prosecution.

## CONCLUSION

Petitioner ask this Court to resolve whether a military officer, who as a matter of state corporations law, occupies a position as a fiduciary and director of the organization allegedly victimized by petitioner, is a person, under statute, "with an interest other than an official interest" in the prosecution of petitioner, who therefore was disqualified from taking official action and making a recommendation as to disposition of petitioner's case.

Respectfully submitted,

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November 20, 2001

[3]Application for Admission to Practice filed with the Court on 16 November 2001.

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Opinion of
United States Court of Appeals for the Armed Forces in
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Opinion of
United States Air Force Court of
Criminal Court of Appeals
*UNITED STATES v WARREN L. DINGES,*
Captain U. S. Air Force
filed January 8, 1997 ..... B-1

UNITED STATES,
Appellee
v.
Warren L. DINGES, Captain
U. S. Air Force,
Appellant

No. 97-0597
Crim. App. No. 32122

United States Court of Appeals for the Armed Forces
Argued December 6, 2000

Decided August 22, 2001

Filed August 22, 2001

*CRAWFORD, C.J., delivered the opinion of the Court, in which GIERKE and BAKER, JJ., joined. BAKER, J., filed a concurring opinion. EFFRON, J., filed a dissenting opinion, in which SULLIVAN, J., joined.*

Counsel

For Appellant: Charles W. Gittins (argued); Colonel James R. Wise, Lieutenant Colonel Timothy W. Murphy, and Captain Karen L. Hecker (on brief).
For Appellee: Major Jennifer R. Rider (argued); Colonel Anthony P. Dattilo and Major Lance B. Sigmon (on brief).
Military Judges: Michael B. McShane and Gregory E. Pavlik

**THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL PUBLICATION.**

Chief Judge CRAWFORD delivered the opinion of the Court.

After an oral argument on May 12, 1998, we ordered a DuBay[1] hearing to determine whether the special court-martial convening authority, who ordered the pretrial investigation and recommended referral to a general court-martial, was disqualified because of an "other-than-official interest in appellant's prosecution." 49 MJ 232, 235 (1998). After the record of the DuBay hearing was returned to this Court, we granted review of the following issues:

I. WHETHER THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY WAS SO CLOSELY CONNECTED TO THE OFFENSE THAT A REASONABLE PERSON WOULD CONCLUDE THAT HE HAD A PERSONAL INTEREST IN THE MATTER WHERE THE CONVENING AUTHORITY WAS A DIRECTOR (AND THUS A FIDUCIARY) AND A DISTRICT CHAIRMAN IN THE VICTIMIZED ORGANIZATION, WHERE HE WAS PERSONALLY APPROACHED IN HIS CAPACITY AS DIRECTOR BY ANOTHER LEADER IN THE ORGANIZATION FOR ASSISTANCE IN HAVING APPELLANT INVESTIGATED FOR CONSENSUAL SEXUAL ACTIVITY, WHERE HE THEN INITIATED THE INVESTIGATION AND WHERE THE CONVENING AUTHORITY SUBSEQUENTLY OBTAINED COMMAND AND SPECIAL COURT-MARTIAL AUTHORITY OVER APPELLANT.

II. WHETHER THE FINDINGS AND SENTENCE OF APPELLANT'S COURT-MARTIAL MUST BE SET ASIDE WHERE APPELLANT'S PLEA OF GUILTY WAS PROCURED BY FALSE AND FRAUDULENT STATEMENTS MADE BY AIR FORCE OFFICIALS TO THE DEPARTMENT OF JUSTICE IN ORDER TO OBTAIN A GRANT OF IMMUNITY FOR A VITAL GOVERNMENT WITNESS, WHERE THE GOVERNMENT FAILED TO PRODUCE THE DOCUMENTS CONTAINING THESE FALSE STATEMENTS TO APPELLANT DURING DISCOVERY AT THE TRIAL AND APPELLATE LEVEL AND WHERE THE STAFF JUDGE ADVOCATE WAS AWARE OF THE FALSE STATEMENTS DURING THE POST-TRIAL PROCESSING OF APPELLANT'S COURT-MARTIAL BUT FAILED TO ADDRESS THIS ERROR IN THE ADDENDUM TO THE STAFF JUDGE ADVOCATE'S RECOMMENDATION.

We hold contrary to appellant's contentions for the reasons set forth below.

FACTS - ISSUE I

Colonel (Col) M, the special court-martial convening authority, testified at the DuBay hearing that he was stationed at Tinker Air Force Base (AFB) from 1991 to 1996, first as the Vice Commander, then as the Wing

Commander. As the Vice Commander, he had little contact with the Boy Scouts. When he became Wing Commander, he was asked and accepted, like his predecessor, to be the District Chairman of one of eight Boy Scout districts in Oklahoma.

The Wing Commander has a prominent position at Tinker AFB. He is the individual on base who interfaces with the community, including the Chamber of Commerce, the Oklahoma City Neighborhood Initiatives Program, and the Oklahoma Military Advisor Committee. Col M also formed the Oklahoma City Bombing Disaster Control Group. He was deeply involved with that Control Group for nearly 24 hours a day from April 19, 1995, for 10 days, and 12 hours a day for 6 weeks thereafter.

Prior to becoming District Chairman, an unsalaried position, Col M's only contact with the Boy Scouts was as a Scout when he was a child, and a parent of a Scout from 1986-91. Personally, he was not overly involved with the Boy Scouts as a youth. He reached the rank of Star (two levels below Eagle Scout) and was also a member of the Order of the Arrow. The district chairmanship did not consume a tremendous amount of time -- meeting less than once a quarter.

Col M learned of the allegations against appellant from Mr. Moore, a full-time paid Scout employee, at a district meeting. Col M contacted the Staff Judge Advocate (SJA) and took actions similar to any case reported to him, initiating an investigation,[2] appointing an Article 32[3] investigating officer, nominating a slate of court members as per standard operating procedure, and forwarding the charges to the general court-martial convening authority. Col M never told Mr. Moore what actions he took; nor did Mr. Moore ask or pressure him in any way. Furthermore, Col M did not know any of the Scouts who had made allegations against appellant, and was not contacted by any family member.

Appellant's transfer to Tinker AFB from Wright Patterson AFB, where he was administratively assigned but not physically located while attending college, was solely to ease the investigation and potential trial and not out of any personal interest. Since appellant was a Doctor of Philosophy candidate in Chemistry at the University of Oklahoma, his transfer to the Wing at Tinker AFB resulted in him being gainfully employed by the Director of Environmental Management at the Air Logistics Center. Prior to assigning appellant to the Environmental Management Director, Col M met with appellant and told him that he should take all the time necessary to work on his defense because this would be a very stressful time in his life. When not working on his defense, Col M told appellant to work hard for the Director because character evidence makes a difference at trial. He then personally drove appellant over to meet the Director.
At the DuBay hearing, the SJA described Col M's Boy Scout role as an "honorary and nominal position[] in his relations in the community." He was merely a figurehead. When asked by the defense if being District Chairman was an appointment duty, he responded: "[I]t was like many of his other duties, an honorary or a very nominal duty."

Col M was not even sure he told the SJA of his position with the Boy Scouts.

## DISCUSSION - ISSUE I

Article 1(9), Uniform Code of Military Justice, 10 USC § 801(9), defines an "accuser" as

> a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

This provision was first enacted as an amendment to Article of War 65. This Article has been described as disqualifying a person from convening a court-martial who, "by reason of having preferred the charge or undertaken personally to pursue it, ... might be biased against the accused, if indeed he had not already prejudged his case." William Winthrop, Military Law and Precedents 62 (2d ed. 1920 Reprint); see Arts. 22(b) and 23(b), UCMJ, 10 USC §§ 822(b) and 823(b). Moreover, Professor Davis describes an accuser as one who "initiates a charge out of a hostile animus toward the accused or a personal interest adverse to him...." George B. Davis, A Treatise on the Military Law of the United States 20 (3d ed. Revised 1913).

Similarly, this Court has found that there is a personal interest when the convening authority is the victim of the accused's attempted burglary, United States v. Gordon, 1 USCMA 255, 2 CMR 161 (1952); where the accused tries to blackmail the convening authority by noting that his son was a drug abuser, United States v. Jeter, 35 MJ 442 (CMA 1992); and where the accused has potentially inappropriate personal contacts with the convening authority's fiancée, United States v. Nix, 40 MJ 6 (CMA 1994). However, a convening authority is not disqualified because of "misguided prosecutorial zeal," United States v. Voorhees, 50 MJ 494 (1999), or where the convening

authority issues an order that the accused violates. United States v. Tittel, 53 MJ 313 (2000).

Col M had no animus towards appellant and sought to ensure his gainful employment at Tinker AFB while the investigation was ongoing. Col M's role with the Boy Scouts has been properly described as titular and "an honorary and nominal" position.[4] The initiation of charges was what any commander would do, and this is demonstrated by the fact that there were no further communications after the initial report made by Mr. Moore. Certainly, Col M was not the victim, was not an individual being blackmailed, and in fact, took less action than the commander in Tittel. For these reasons, we hold that Col M did not have "an interest other than an official interest" in appellant's case.

## FACTS - ISSUE II

Prior to appellant's plea at his trial on November 14, 1995, the defense was informed that the victim was given a grant of immunity. However, the victim continued in his refusal to testify, despite the immunity. Defense indicated after a session under RCM 802, Manual for Courts-Martial, United States (2000 ed.),[5] that they had no notice of the immunity given to the Scout. At the request of the judge, the Government gave the defense a copy of the grant of immunity from the Department of Justice, as well as the Tinker AFB Staff Judge Advocate's letter seeking the grant of immunity. Those documents describe the victim's age as 16. However, the defense was not given other documents prepared by attorneys at Bolling AFB and transmitted to the Department of Justice that misstated the victim's age.

The only motion made at that time was to dismiss the charges on the basis that Article 125, Uniform Code of Military Justice, 10 USC § 925, is constitutionally defective. The defense also moved to dismiss on the grounds that the prosecution of the accused was in violation of Equal Protection rights under the Constitution; appellant had been

singled out because of his sexual preference that violated Department of Defense Directives. The judge denied both motions, and they are not at issue in this case.

## DISCUSSION - ISSUE II

Issue II raises questions of standing and mootness. Assuming, without deciding, that the defense is correct in its assertion that the Department of Justice gave the victim immunity under the mistaken belief that he was under 16 years of age when his sodomous relationship with appellant occurred, that issue is now moot. The Government never called the victim as a witness. See United States v. Napoleon, 46 MJ 279, 281-82 (1997); United States v. Loving, 41 MJ 213, 258 (1994)(applying mootness to the question of misconduct of judge). Secondly, the doctrine of invited error precludes any relief. The victim was called by the defense during the sentencing portion of the trial. Thus, any error as to the admission of the testimony was invited by the defense when they called the witness themselves. See, e.g., United States v. Reid, 46 MJ 236 (1997); United States v. Raya, 45 MJ 251 (1996); United States v. Schnitzer, 44 MJ 380 (1996).

Thirdly, appellant does not have standing to raise the violation of another's Fifth Amendment rights. United States v. Johnson, 53 MJ 459, 461 (2000); United States v. Golston, 53 MJ 61, 64 (2000); United States v. Jones, 52 MJ 60, 63-64 (1999). Additionally, the record is clear that appellant pled guilty to prevent the victim from facing the consequences of refusing to testify after receiving a grant of immunity.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

FOOTNOTES:

[1] United States v. DuBay, 17 USCMA 147, 37 CMR 411 (1967).

[2] It was because of the "don't ask don't tell" policy that he called the Office of Special Investigations and asked them to initiate the investigation.

[3] Uniform Code of Military Justice, 10 USC § 832.

[4] Commanders and convening authorities, because of their military positions, are often called upon to provide services to a host of civic organizations, both on base and in the surrounding communities. While nothing herein should discourage this practice, care should be taken to avoid potential disqualification due to an appearance of personal interest in a matter.

[5] All Manual provisions are identical to the ones in effect at the time of appellant's court-martial.

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BAKER, Judge (concurring)

A. Meaning of Accuser

This case is about the meaning of RCM 601, Manual for Courts-Martial, United States (1995 ed.), as determined by the plain language of the rule and this Court's case law. RCM 601(c) states: "An accuser may not refer charges to a general or special court-martial." "The term 'accuser' means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused." Art.

1(9), Uniform Code of Military Justice, 10 USC § 801(9)(emphasis added). This Court's case law puts further flesh on the meaning of the phrase "other than an official interest in the prosecution of the accused."

Personal interests relate to matters affecting the convening authority's ego, family, and personal property. A convening authority's dramatic expression of anger towards an accused might also disqualify the commander if it demonstrates personal animosity. United States v. Voorhees, 50 MJ 494, 498 (1999). However, an officer need not act with animus or anger to become an accuser. United States v. Allen, 31 MJ 572, 589 (NMCMR 1990). In applying RCM 601, this Court has said that we "cannot peer into the mind of a convening authority to determine his mental condition, but we can determine from the facts whether there is a reasonable probability that his being the victim of an offense tended to influence a delicate selection." United States v. Gordon, 1 USCMA 255, 261, 2 CMR 161, 167 (1952).

Since its inception, this Court has consistently applied a contextual RCM 601 test: "[W]hether, under the particular facts and circumstances . . . a reasonable person would impute to [the convening authority] a personal feeling or interest in the outcome of the litigation." United States v. Jeter, 35 MJ 442, 445 (quoting United States v. Gordon, supra at 260, 2 CMR at 166). In Voorhees, for example, the Court looked to the record and found that it "contain[ed] no evidence of personal interest on the part of the officer acting in appellant's case[.]" 50 MJ at 499. Congress has not chosen to legislate a different, more stringent test, such as those familiar in other contexts based on the possibility of a conflict, or the appearance of a conflict.

In United States v. Nix, 40 MJ 6 (CMA 1994), the Court determined that the appellant was entitled to a factual review as to whether the convening authority had a personal interest in the outcome of litigation, where the appellant was charged, inter alia, with inappropriate contacts with the convening authority's girlfriend (and subsequently wife). As

is clear from Nix, this Court has eschewed a per se rule, or appearance-of-conflict rule, when it comes to the meaning of the term "accuser." If the appearance or possibility of a conflict was the test, I cannot imagine a clearer exemplar than Nix, and yet, the case was remanded to allow the appellant an opportunity to present evidence on the issue of the convening authority's "possible bias against him" and, presuming the truth of the appellant's assertions, to determine prejudice. Id. at 7 (emphasis added).

Moreover, the role of an accuser is judged on a factual continuum rather than with absolute thresholds. In Allen, the court reiterated that "[t]he basic test for determining whether the convening authority is an accuser is whether he is 'so closely connected to the offense that a reasonable person would conclude that he has a personal interest in the matter.'... Thus, when a convening authority directs an action or bases his decision on a personal rather than an official interest, he is statutorily disqualified from acting as a convening authority." 31 MJ at 585 (quoting Gordon, supra at 261, 2 CMR at 167).

This Court has already recognized the applicability of the contextual Gordon test to this case, stating on remand: "At the heart of the granted issue is the following question: Was Col. M so closely connected with this offense that a reasonable person would conclude that he had a personal interest in this case?" 49 MJ at 234 (emphasis added). How closely connected was Col M? The record reflects the following:

- Col M was affiliated with the Boy Scouts of America (BSA) because he was in a position of community interface as Wing Commander and previously as Vice Commander.

- He was not affiliated with the BSA as an adult before or after he held these official positions.

- There is no indication in the record that appellant's troop was within Col M's district; Col M testified that, to his knowledge, it was not.

- Col M had never met appellant before his transfer to Tinker AFB.

- He did not know any of the alleged victims.

- He viewed his affiliation with the BSA as irrelevant to appellant's case.

- He never responded or advised the BSA as to the status of the case.

For these reasons, the lower court found "no evidence of personal involvement by Col M in either the investigation of the charges or the appellant's transfer to Tinker AFB." Unpub. op. at 3. This factual finding was not clearly erroneous. Based on these "particular facts and circumstances" and the law as reviewed above, I concur in the judgment of this Court that Col M was not an accuser for the purposes of Article 1(9). To paraphrase the analysis in United States v. Tittel, 53 MJ 313 (2000), I find it unlikely, given the nature of the allegation against appellant, that any competent authority would not have referred this case to the Office of Special Investigations (OSI) for appropriate investigation. Moreover, the record reflects that Col M did not act out of a sense of loyalty, duty, or legal obligation to the BSA; after the matter was brought to his attention by Mr. Moore, he did not have any contact with the BSA regarding this matter. Indeed, he never responded to Mr. Moore, as to the disposition of his inquiry.

In hindsight, with all the benefit of retrospect, Col M might have avoided this issue by stepping out of the process. However, he was not required legally to do so.

B. Waiver

Appellant is not well situated to complain. During discovery, appellant's counsel received the statement of Paul Moore, the BSA executive who asked Col M to look into this matter. This four-page statement includes the following reference to Col M:

> 6/3/95 – I talked with Big Teepe [Sic] District Chairman, Col [M]. He indicated the Air Force would look into the case.

The DuBay record indicates that Moore's statement would have been provided to appellant sometime after his discovery request of October 12, 1995, but prior to October 24, 1995, on which date a subsequent Government response to discovery states that the Government previously provided the OSI report of investigation to appellant During this same time period, appellant would have known that Col M was taking official actions regarding his case. Among other things, Col M signed the appointing order for an Article 32 investigation. A copy of this appointing order would have been disseminated to defense counsel prior to the investigation and would have been included with the Article 32 investigation report provided to counsel. Appellant would have had 5 days to submit objections to this report. RCM 405(j)(4).

On October 25, 1995, one day after we can be certain appellant was in possession of Mr. Moore's statement, Col M transmitted to the convening authority a recommendation for a general court-martial. Presumably, appellant and counsel would have been in receipt of a copy of this document before trial as well. Nonetheless, appellant did not raise his concerns regarding Col M's possible position as an "accuser" until his appeal to the Court of Criminal Appeals.

Appellant might have tested whether Col M was an "accuser" for the purposes of RCM 601(c) prior to the appellate process. However, because the CCA has not erred in applying RCM 601 to this case, we need not decide whether the one sentence in Mr. Moore's statement provided a sufficient foundation to find that appellant waived his RCM 601 claim.

FOOTNOTE:

* There are a number of inherent and facial tensions within the military justice system and the chain of command which arguably create the appearance of a conflict of interest. The convening authority, for example, not only decides whether to prosecute charges at court-martial, but is also responsible for selecting the members of the court. Nonetheless, Congress has not chosen to disqualify the convening authority from selecting members of the jury.

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EFFRON, Judge, with whom SULLIVAN, Judge, joins (dissenting):

The majority opinion concludes that it was permissible for Col M to act as the special court-martial convening authority in the present case. Col M, however, was subject to conflicting interests which precluded him from exercising the prosecutorial discretion of a special court-martial convening authority under applicable statutes, rules, and case law. See Arts. 1(9), 22(b), and 23(b), UCMJ, 10 USC §§ 801(9), 822(b), and 823(b); RCM 401(c)(2)(A), Manual for Courts-Martial, United States (2000 ed.); United States v. Gordon, 1 USCMA 255, 261, 2 CMR 161, 167 (1952); United States v. Nix, 40 MJ 6 (CMA 1994). I respectfully dissent.

## I. BACKGROUND

### A. The exercise of prosecutorial discretion by court-martial convening authorities

The special court-martial convening authority plays a pivotal role in the military justice system, with broad discretion over the disposition of allegations and charges. Under RCM 306 and RCM 404, Manual, supra, Col M had virtually unfettered authority to choose among a variety of options, including: (1) follow the lead of civilian authorities and take no action; (2) dismiss any charges that may have been preferred; (3) take administrative action; (4) institute nonjudicial punishment proceedings; (5) refer the charges to a summary court-martial; (6) refer the charges to a special court-martial; or (7) order an investigation under Article 32, UCMJ, 10 USC § 832. After receiving the report of the Article 32 investigating officer, Col M had the authority to take any of the actions available to him prior to the investigation, as well as the option -- which he exercised -- of forwarding the matter to a superior commander for consideration of referral to a general court-martial. See RCM 404(c). Although a servicemember's fate ultimately rests with the forum in which a case is considered, the exercise of prosecutorial discretion by the special court-martial convening authority is a critical decision point, particularly in terms of the severity of possible punishment.

To ensure that court-martial convening authorities exercise their considerable discretion with objectivity and without influence of personal interest, Articles 22(b) and 23(b) prohibit a commanding officer from convening a general or special court-martial when that officer is an "accuser." The definition of "accuser" under the Code includes a "person who has an interest other than an official interest in the prosecution of the accused." Art. 1(9); see also RCM 401(c)(2). A commanding officer who is disqualified

from functioning as a convening authority because he or she is an accuser must forward the charges for disposition by a superior convening authority. See Arts. 22(b) and 23(b); RCM 504(c)(3), Manual, supra.

B. The relationship between Col M's interests and the investigation of appellant

As we noted in our initial review of this case, "At the heart of the granted issue is the following question: Was Col M so closely connected with this offense that a reasonable person would conclude that he had a personal interest in this case?" 49 MJ at 234. The factual background concerning Col M's interest is detailed in the record of the proceedings we ordered under United States v. Dubay, 17 USCMA 147, 37 CMR 411 (1967). When Col M assumed command of the 72nd Air Base Wing at Tinker Air Force Base (AFB) in July 1994, local Boy Scout officials asked him to be Chairman of the Big Teepee District of the Boy Scouts, one of eight districts in Oklahoma. Col M initially declined the request, but he reconsidered and decided to serve as Chairman because "he thought he could get good people to pay attention to them [the Boy Scouts organization] and to help them raise money[.]" The Council held 6 bimonthly meetings each year, and Col M attended "approximately 4" of the 6 meetings.

As Chairman of the Big Teepee District, Col M "was automatically also a member of the Board of Directors for the Last Frontier Council . . . a separately incorporated local Boy Scout council serving central, western, and southwestern portions of the State of Oklahoma." The Board of Directors exercised responsibility over the annual fundraising campaign. As a member of the Board, Col M "was responsible for contacting 10 to 12 fairly prominent people in the community and giv[ing] each of them a list of

names to call and ask for money on behalf of the Boy Scouts."

Mr. Paul Moore, a central figure in the events that led to appellant's court-martial, was the Executive Director of the Last Frontier Council. As a salaried employee of the Boy Scouts, he was responsible for the day-to-day operations of the Council and accountable to the Council's Board of Directors. In November 1994, Mr. Moore heard of alleged sexual relationships between appellant, who then was an assistant scoutmaster of a troop, and several Boy Scouts. After "verif[ying] the information in his own mind," Mr. Moore confronted appellant, who confirmed one such relationship. Mr. Moore thereupon suspended appellant's involvement in the Boy Scouts.

After this meeting, Mr. Moore contacted civilian "local law enforcement officials to explore possible investigation concerning Captain Dinges' conduct." The civilian officials advised Mr. Moore that because appellant's alleged relationship involved an individual who was older than 16 years of age, the age of consent in Oklahoma, the civilians "were not interested in prosecuting" appellant.

On June 3, Col M attended the Last Frontier Council meeting at the Scout Service Center in Oklahoma City. Mr. Moore approached Col M, who was wearing his Air Force uniform, and "indicated that he had received information about an improper relationship between Captain Dinges and a Boy Scout." Mr. Moore asked "if this was something that the Air Force should be aware of," and Col M responded that "he was not sure, but that it was something the Air Force should look into and an investigator would contact Mr. Moore."

Later that day, Col M contacted his Staff Judge Advocate, who confirmed that the matter fell "within the scope of matters for investigation." The following day, Col M provided the Air Force Office of Special Investigations (OSI) with the information he received from Mr. Moore. The OSI, in turn, obtained permission to open an investigation

from appellant's commander at the Air Force Institute of Technology (AFIT).

C. Col M's exercise of prosecutorial discretion

In August, appellant's commander was advised that the investigation was complete, that there was "sufficient information to disenroll Captain Dinges" from the PhD program in which he was a full-time student, and that the "recommended approach" was to transfer control of appellant from the AFIT to Tinker AFB. The commander agreed and called Col M to determine whether it was possible to transfer appellant to an organization at Tinker AFB "while the court process was being facilitated." Col M agreed to the reassignment of appellant. Appellant was designated as a "special assistant" to Col M, and he was assigned to work in the Environmental Management Directorate.

Col M directed an Article 32 investigation into the allegations, and the investigating officer recommended that charges be referred to trial by a general court-martial. Col M forwarded this recommendation to the general court-martial convening authority with his concurrence and recommended the names of possible court-members. Col M did not disclose his affiliation with the Boy Scouts of America when he forwarded his recommendation to the general court-martial convening authority.

## II. DISCUSSION

Col M held high-level positions of responsibility in the Boy Scout organization. He was a District Chairman and, in that capacity, served as a member of the Council's Board of Directors. As such, he owed a fiduciary duty of loyalty to the Boy Scouts. See Okla. Stat. Ann. tit. 18, § 1006B.7.a;

Resolution Trust Corp. v. Greer, 911 P.2d 257, 261 n.9 (Okla. 1995); Wilson v. Harlow, 860 P.2d 793, 798 (Okla. 1993). This was more than a nominal position. An important element of his responsibilities involved using his influence to persuade persons of means to financially support the Boy Scouts.

The subject of homosexuality is a highly charged matter for both the Boy Scouts, see Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000) (sustaining the Boy Scouts' First Amendment right to eject an admitted homosexual assistant scoutmaster from adult membership), and for the armed forces, see 10 USC § 654 (policy concerning homosexuality in the armed forces). With respect to the allegations against appellant, the impact on each entity was not necessarily the same. Because the impact could vary, there was a reasonable possibility that each organization's assessment of the proper disposition of the charges, and the factors considered in that process, would differ.

The potential conflict between Col M's personal interest in the impact the allegations might have on his fundraising and other activities with the Boy Scouts, on the one hand, and his role as appellant's Air Force commander, on the other, is precisely the type of situation that Congress sought to avoid when it disqualified an accuser from serving as a special or general court-martial convening authority. We need not question Col M's good faith, self-assessment of impartiality to find that his personal interest disqualified him from serving as a special court-martial convening authority. The majority finds it noteworthy that Col M was not the victim of appellant's conduct, and that he was not blackmailed by appellant. The test, however, is not whether a commander exhibited bias or prejudice, but simply whether the commander had "an interest other than an official interest in the prosecution of the accused." Art. 1(9). Because Col M had such an interest, he was disqualified from exercising

authority over appellant's case and should have notified the general court-martial convening authority under RCM 401(c)(2). Under these circumstances, the findings and sentence should be set aside and the case should be returned to the Judge Advocate General with authority to order a rehearing. See Nix, 40 MJ at 8.

FOOTNOTE:

* The record also indicates that in May 1995, Mr. Moore heard of contact between appellant and two 15-year old Boy Scouts, but it does not provide any details, and this information was not reflected in the charges against appellant.

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**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Captain WARREN L. DINGES, 460-55-6197**
**United States Air Force**

**ACM 32122**

**Filed January 8, 1997**

Sentence adjudged 15 November 1995 by GCM convened at Tinker Air Force Base, Oklahoma. Military Judge: Michael B. McShane (sitting alone).

Approved sentence: Dismissal, 5 months confinement, and total forfeitures.

Appellate Counsel for Appellant: Colonel Jay. L. Cohen, Colonel David W. Madsen, Captain Harold M. Vaught, and Charles W. Gittins, Esq.

Appellate Counsel for the United States: Colonel Theodore J. Fink, Lieutenant Colonel Michael J. Breslin, and Captain Libby A. Brown.

Before

PEARSON, MORGAN, C.H., II, and MORGAN, J. H.
Appellate Military Judges

## OPINION OF THE COURT

MORGAN, C.H., II, Judge:

Appellant was convicted, consistent with his pleas, of sodomy on divers occasions from February through July of 1994. The record reveals that he engaged in oral and anal sodomy with a sixteen year old boy, MRC, some 40 to 50 times while the appellant served as an assistant scoutmaster with the Boy Scout troop to which MRC belonged. A military judge, sitting alone, sentenced appellant to a dismissal, total forfeitures, and confinement for 5 months. Appellant appeals, asserting four different errors, none of which are meritorious.

### *Disqualification of the Special Court-Martial Convening Authority and Appellant's Commander*

Appellant first contends that the special court-martial convening authority, Colonel (Col) Randy Mills, and appellant's commander, Col Hammerstrom, should have been disqualified from acting in his case because they were both associated with the Boy Scouts of America (BSA). Over government objection, appellant supplied us with an affidavit in which he claims he "learned from friends associated with the Boy Scouts" that Col Hammerstrom was a local scout leader in the Tinker Air Force Base community and Col Mills was a district chairman of the Big Tepee district of Oklahoma.

Assuming for purposes of discussion that appellant's hearsay information is correct, we do not believe that Col Mills' or Col Hammerstrom's affiliation with the Boy Scouts disqualified either from acting in his case. As the special court-martial convening authority, Col Mills took action to have the allegations investigated pursuant to Article 32, USMJ, 10 U.S.C. § 832 and upon completion of the recommendation, concurred with the recommendation of the

investigating officer to refer the case to a general court-martial. We see nothing in Col Mills' status which would serve to personalize his interest in appellant's case or to suggest that he had anything other than a professional interest in its outcome. *Cf. United States v. Nix*, 40 M.J. 6 (C.M.A. 1994).

The same analysis obtains with respect to Col Hammerstrom. Appellant's accusation that Col Hammerstrom "engineered" his reassignment from the Air Force Institute of Technology (AFIT) (appellant was a PhD candidate at the University of Oklahoma) to the 72nd Air Base Wing is not borne out by his evidence, which shows that AFIT initiated the transfer through the Air Force Military Personnel Center. No competent evidence, nor even appellant's speculation, provides us with a shred of proof that Col Hammerstrom's actions were other than pursuant to his official duties and we decline to impute sinister motivations in the absence of any such proof.

*Disqualification of the Staff Judge Advocate*

Appellant also tars Col Pratt, the staff judge advocate to the general court-martial convening authority, with the same brush. He states, "I also learned...that Colonel Andrew Pratt, the staff judge advocate, was an adult volunteer active in the Boy Scouts of America organizations local to Tinker Air Force Base." In his own affidavit Col Pratt declares, "At no time in my life, during my youth, my adolescence, or my adult life, have I ever been affiliated in any way whatsoever, in my personal or official capacity, with the Boy Scouts of America." Although we would be hard put to imagine a more emphatic contradiction to appellant's sworn affidavit, as with the case of Col Hammerstrom and Col Mills, there is nothing in the mere association with the Boy Scouts which would act as a *per se* disqualification. Appellant himself states that none of the three officers were involved, officially or otherwise, with the particular troop to which MRC

belonged and in which appellant served as the assistant scoutmaster, nor were they even associated with the same district. Appellant's bias argument is all the more elusive when we stop to consider that throughout the record of trial he and his counsel were at pains to point out that the relationship with MRC did not originate directly through the Boy Scouts, and that the various acts of sodomy were not performed while participating in Boy Scout events. There is no allegation that any of the three officers or any member of their families were themselves involved, much less victimized, by the events which formed the gravamen of appellant's court-martial. Nor, indeed, according to the testimony of a representative of the Boy Scouts, were the Scouts institutionally victimized by the appellant. When word leaked out that appellant had a homosexual relationship with one or more of the scouts in his troop, the local BSA district took prompt and appropriate action to sever appellant's ties with the BSA, action he did not then nor does he now dispute.

Appellant further contends that Col Pratt was disqualified from giving post-trial advice because he participated as trial counsel in the court-martial and he was involved in securing testimonial immunity for MRC. Leaving aside the fact that appellant made no issue of this in his response to the staff judge advocate's recommendation (SJAR), and thus arguably waived it, R.C.M. 1106(f)(6), we see nothing improper in the staff judge advocate's actions nor do we detect any evidence of bias. His consultation with the trial counsel was *apropos* of ensuring that the terms and timing of the grant of immunity were accurately conveyed to the military judge, nothing more. Clear precedent holds that a staff judge advocate is not disqualified from giving post-trial advise to the convening authority where the convening authority directs the staff judge advocate to implement immunity procedures. There is nothing in the record to suggest that either was incapable thereby of acting impartially on the case. *See United States v. Newman*, 14

M.J. 474 (C.M.A. 1983); *United States v. Decker*, 15 M.J. 416 (C.M.A. 1983).

*Sentence Appropriateness*

Appellant next argues that his sentence is inappropriate given his plea of guilty, sterling military record, and because consensual homosexual sodomy may be addressed administratively. He does not gainsay that the UCMJ may also be an appropriate avenue, but argues that it should not have been used in his case. Throughout the trial, appellant attempted to characterize his relationship with MRC as one of homosexual sodomy with a consenting adult. To be sure, MRC was 16 years old at the time the acts took place. But that he had reached the age of consent does not alter the fact that appellant took advantage of a demonstrably emotionally immature young man, who had been diagnosed as Severely Emotionally Disabled, whose father had just died of AIDS, and who was estranged from his own mother. MRC's very first sexual encounter was to be anally sodomized by a man who, as the assistant scoutmaster, occupied a role of *in loco parentis*, and who, while in that role, urged MRC to embrace his homosexuality. We are also influenced in deciding that appellant's sentence is appropriate, by noting that appellant persisted in attempting to prolong the sexual relationship with MRC through written importunities and through appellant's close friends long after it was manifestly clear that MRC wanted nothing more to do with him. Under these circumstances we are persuaded that the military judge took proper account of appellant's record, his plea, and the particularized circumstances of his crime in arriving at the proper sentence, and that he got the sentence he deserved. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988).

*Constitutionality of Article 125, UCMJ, 10 U.S.C. § 925*

Finally, we consider appellant's suggestion, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that Article 125 unconstitutionally infringes his right of privacy. That question has been settled adversely to appellant by the Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986). See also *United States v. Fagg*, 34 M.J. 179 (C.M.A. 1992).

*Conclusion*

The findings and sentence are correct in law and in fact, the sentence is appropriate, and the same are hereby

AFFIRMED.

Senior Judge PEARSON and Judge J.H. Morgan concur.

OFFICIAL

ROXANE M.G. PORTER
Staff Sergeant, USAF
Chief Court Administrator